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See "MT Suppress or Terminate for Rights Violations Unrelated to Proceedings" under Boilerplate>Motions for claims related to mistreatment in detention at the border or other cases where there is no nexus between the violation and proceedings.

Motions to Suppress or Terminate for Regulatory Violations

Violations During Removal Proceedings

Where DHS or EOIR violates its own regulations *during* removal proceedings, the Second Circuit has set forth a two part test to evaluate what relief is due, if any. See Waldron v. INS, 17 F.3d 511 (2d Cir. 1993). Under Waldron, a regulatory violation that occurs during removal proceedings requires termination of an immigration proceeding in two circumstances: (1) if the violated regulation was promulgated to protect a fundamental right guaranteed by the Constitution or a federal statute, or (2) if the violation did not affect a fundamental right, but can be shown to have otherwise prejudiced the rights protected by the regulation. Waldron, 17 F.3d at 518; see also Rajah v. Mukasey, 544 F.3d 427, 446-47 (2d Cir. 2008) (expressly limiting the holding in Waldron to violations that occur during removal proceedings).

Violations Prior to Removal Proceedings

When an agency violates its own regulations *prior* to the initiation of removal proceedings, the relevant inquiry is whether "DHS's error implicated a fundamental right." Nolasco v. Holder, 637 F.3d 159, 165 (2d Cir. 2011). Pre-hearing regulatory violations are not grounds for termination "absent prejudice that may have affected the outcome of the proceeding, conscience-shocking conduct, or a deprivation of fundamental rights." Rajah, 544 F.3d at 447. Where a regulation was promulgated to protect a due process right, such as the "right . . . to receive notice provided for in the NTA," but "it is clear that the . . . alien received such notice, she has no due process claim, regardless of any technical defect in the manner in which the NTA has been served." Nolasco, 637 F.3d at 164.

Where a regulatory violation does not affect a fundamental right, the proceeding should be invalidated only if petitioner shows that the "infraction affected either the outcome or the overall fairness of the proceeding." Montero v. INS, 124 F.3d 381, 386 (2d Cir. 1997); see also Waldron, 17 F.3d at 518 (noting that, where no regulation violates a fundamental right, it "is best to invalidate a challenged proceeding only upon a showing of prejudice to the rights sought to be protected by the subject regulation"). In the absence of such prejudice, termination would "place an unwarranted and potentially unworkable burden on the government's adjudication of immigration cases." Waldron, 17 F.3d at 518.

Where the respondent is prejudiced by a regulatory violation, but termination is not required, "the Immigration Judge, where possible, can and should take correction action short of termination of the proceedings. For example . . . the Immigration Judge could allow additional time to prepare or obtain counsel." Matter of Hernandez, 21 I&N

Dec. 224, 228 (BIA 1996). Suppression of evidence may also be warranted "when an egregious or fundamentally unfair violation of applicable law occurred or when a violation of applicable law undermines the reliability of the evidence in question." Rajah, 544 F.3d at 446 (citing Almeida-Amaral v. Gonzales, 461 F.3d 231, 234 (2d Cir. 2006); see also Matter of Garcia-Flores, 17 I&N Dec. 325, 327-28 (BIA 1980).

Where DHS seeks to re-serve a respondent to effect proper service of an NTA that was defective under the regulatory requirements for serving minors under the age of 14, a continuance should be granted for that purpose. Matter of W-A-F-C-, 26 I&N Dec. 880 (BIA 2016) (holding that because DHS made requests and efforts to re-serve the NTA and the respondent appeared with counsel at both of his master calendar hearings, the IJ should have granted DHS another opportunity to effect proper service); *see also Matter of E-S-I-*, 26 I&N Dec. 136, 145 (BIA 2013) ("If the DHS did not properly serve the respondent where indicia of incompetency were either manifest or arose during a master calendar hearing that was held shortly after service of the notice to appear, the Immigration Judge should grant a continuance to give the DHS time to effect proper service.").